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HAROLD B. WILLEY, Clerk

In the Supreme Court
of the United States

OCTOBER TERM, 1954
No. 581

STANLEY G. TERRY, *Plaintiff-Appellant,*

v.

CITY OF PORTLAND, OREGON, a municipal corporation; DOROTHY McCULLOUGH LEE, individually and as Mayor of the City of Portland, Oregon; ORMOND R. BEAN, J. E. BENNETT, WILLIAM A. BOWES, and FRED L. PETERSON, individually and as Commissioners of the City of Portland, Oregon; DONALD I. McNAMARA, individually and as Chief of Police of the City of Portland, Oregon; and ALEXANDER G. BROWN, individually and as City Attorney of the City of Portland, Oregon, *Defendants-Appellees.*

On Appeal from the Supreme Court of the State of Oregon

APPELLEES' MOTION TO DISMISS AND TO ADJUDGE AS DAMAGES DOUBLE COSTS, AND BRIEF IN SUPPORT OF MOTION

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NO.

STANLEY G. TERRY, *Plaintiff-Appellant,*

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CITY OF PORTLAND, OREGON, a municipal corporation; DOROTHY McCULLOUGH LEE, individually and as Mayor of the City of Portland, Oregon; ORMOND R. BEAN, J. E. BENNETT, WILLIAM A. BOWES, and FRED L. PETERSON, individually and as Commissioners of the City of Portland, Oregon; DONALD I. McNAMARA, individually and as Chief of Police of the City of Portland, Oregon; and ALEXANDER G. BROWN, individually and as City Attorney of the City of Portland, Oregon,

Defendants-Appellees.

On Appeal from the Supreme Court of the State of Oregon

APPELLEES' MOTION TO DISMISS AND TO ADJUDGE AS DAMAGES DOUBLE COSTS, AND BRIEF IN SUPPORT OF MOTION

MOTION

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move:

I.

That this appeal be dismissed on the following grounds:

(a) that the federal questions sought to be reviewed by this appeal were not properly raised and in any event were abandoned by appellant both in the trial court and in the Supreme Court of Oregon and were first sought to be raised after abandonment by petition to the Supreme Court of Oregon for rehearing, and that therefore the federal questions sought to be reviewed herein were not timely or properly raised;

(b) that the Supreme Court of Oregon did not pass upon the federal questions sought to be raised herein;

(c) that the judgment of the Supreme Court of Oregon from which this appeal is made rests on an adequate non-federal basis; and

(d) that the federal questions sought to be raised herein are not substantial.

II.

And, further, that pursuant to 62 Stat. 954, Title 28, U.S.C. § 1912, if this appeal is dismissed, this Court adjudge to the appellees double costs as damages or as the Court may find just, for the delay occasioned by this appeal.

BRIEF IN SUPPORT OF MOTION

HISTORY OF THE CASE

This suit for declaratory judgment attacks the validity of Ordinance No. 94553 (Appendix A) of the City of Portland, Oregon, which prohibits ownership, maintenance, control, operation, use or play of coin-in-the-slot operated mechanical games or devices containing any inherent element of chance, bonus or prize, expressly including within such prohibition pinball games. Appellant, owner of pinball games, charged among other things in the second amended complaint (Tr.), that the ordinance was not within the police power; that it was vague and indefinite; that it would take away a right in property lawful when acquired and vested by license, thus depriving plaintiff and other pinball owners of their property without due process of law, violating constitutional rights and immunities under federal and state constitutions (Par. VII, Compl.), but not specifying any provision thereof; that it violated equal protection of the laws by improper classification, and that the ordinance conflicted with state statutes and was contrary to state policy.

Appellees put all these claims in issue by interposing a motion for judgment on the pleadings (Tr.). Although appellees argued all phases in the trial court, plaintiff-appellant argued only statutory conflict and state policy as shown on the face of the record by the statement of the dissenting opinion in the trial court "Only the first of these grounds [that the State has pre-empted the

field of pinball legislation] has been presented to us and considered by us" (Jur. St. App. A, p. 21). The majority opinion of the trial court held the ordinance invalid on the ground of statutory pre-emption and conflict with state policy (Jur. St. App. A., pp. 17-20).

The City appealed the trial court decree to the Supreme Court of Oregon and in its brief covered all phases of the complaint.

Appellant discussed only statutory conflict and state policy in his brief, and argument was limited to this charge. The main opinion of the Supreme Court of Oregon (Jur. St. App. B, pp. 34-68, 58 Or. Adv. Sheets 547, 269 P. 2d 544) held that the ordinance was within the police power and a valid exercise of such power, and that there was no statutory conflict or conflict with state policy. The concurring opinion of Chief Justice Latourette (Jur. St. App. B, pp. 69-73; 58 Or. Adv. Sheets 547, 577, 269 P. 2d 544, 558) discusses only the question of conflict with state statute and policy.

The abandonment by appellant of all issues except conflict with state law and policy is shown by the statement in the majority opinion of the Oregon Supreme Court "Upon this appeal the plaintiff does not claim that the ordinance contravenes any principle of constitutional law * * *" (Jur. St. App. B, p. 36, 58 Or. Adv. Sheets 547, 549, 269 P. 2d 544, 546). The Oregon Court pointed out that the only allegation material to the appeal or urged on appeal was the claim of conflict between the ordinance and state law (Jur. St. App. B,

p. 39; 58 Or. Adv. Sheets 547, 551, 269 P. 2d 546, 547). This is also shown by the quotation of colloquy between the Court and appellant's counsel set forth in the special concurring opinion as follows (Jur. St. App. B, p. 69, 58 Or. Adv. Sheets 547, 577, 269 P. 2d 544, 558):

> "Q. (By the Court) Do you agree that if the 1943 act is a revenue measure and not one under the police power, the city would then have the right, under the police power, to pass the ordinance in question?
>
> A. I concede the point that if the 1943 measure, Ch. 220, is strictly a tax measure, then I have no standing in court."

Not until the petition for rehearing did plaintiff-appellant seek to renew his charges that the ordinance was invalid on any of the other grounds mentioned in the complaint. There appellant sought rehearing on the additional and enlarged grounds of ambiguity, violation of the equal protection clause of the 14th Amendment of the United States Constitution and a similar provision in the state constitution, and a violation of the due process clause of the 14th Amendment of the United States Constitution (Tr.). The petition for rehearing was denied by the State Supreme Court without comment (Tr.).

Plaintiff now appeals to this Court on the ground that the ordinance violates the due process clause and the equal protection clause of the 14th Amendment to the Federal Constitution (Notice of Appeal). The Jurisdictional Statement abandons the latter ground and limits its claim to the due process clause.

SUMMARY OF ARGUMENT

The record in this case shows that the plaintiff-appellant in his complaint failed specifically to invoke the 14th Amendment of the Federal Constitution in the allegations relating to due process, although reference was made to the Federal Constitution in general terms. Therefore, it appears that the federal question sought to be reviewed here was not properly raised.

If the complaint be construed so broadly as to consider the federal question properly raised with regard to due process of law, then the record discloses that this point was abandoned by plaintiff-appellant both in the trial court and again in the Supreme Court of Oregon. The first time that the question now sought to be reviewed was specifically raised was in the petition for rehearing after the judgment of the Supreme Court of Oregon, which is too late in a case such as this to provide a jurisdictional basis for this Court. Therefore the record shows that the federal question was not timely raised by plaintiff-appellant in this cause.

The record shows on its face that the opinions of the Supreme Court of Oregon did not cover the question sought to be reviewed here and did not involve federal questions, either expressly or by necessary implication. Therefore, in accordance with the decisional rules of this Court, the Court is without jurisdiction, since the State Supreme Court neither had the questions before it nor did it rule upon them. Therefore on this basis, the appellate jurisdiction of this Court fails.

On the face of the ordinance attacked in this suit and now appealed to this Court, there was no violation of due process of law under the 14th Amendment to the Federal Constitution or otherwise, and the ordinance was a valid and proper exercise of police power of the State of Oregon delegated to the City of Portland, Oregon, which was decided by the State Supreme Court as a matter of general law. Not only is the federal question of due process removed from the case by the determination of validity under the police power by the State Supreme Court, but it is self-evident that the assertion of violation of the due process clause of the 14th Amendment is without merit, frivolous, and intended for purposes of delay.

Therefore, since the contentions of the plaintiff-appellant on this appeal are demonstrably unsubstantial and frivolous, the conclusion seems inescapable that the appeal is made solely for the purpose of delay and plaintiff-appellant merits the discretionary exercise of the power of this Court to award to appellees double costs as a penalty for the delay and vexation of this appeal, or such other damages as the court may find merited.

ARGUMENT

I. Constitutional Question Was not Properly Raised.

Although the notice of appeal in this cause claimed two grounds, only one question is stated in the jurisdictional statement of appellant (Jur. St. p. 5), namely,

a claim of violation of the Due Process Clause of the 14th Amendment to the Constitution. From Rule 15 of the Revised Rules of this Court, we take it that once again appellant has abandoned an issue asserted. Therefore this argument is directed to the one ground now alone claimed.

We submit that the complaint did not sufficiently specify constitutional issues to support this appeal. No clause of the Federal Constitution is directly invoked. The only mention of the Federal Constitution in the complaint is in paragraph VII where it is alleged that the ordinance will deprive plaintiff of his property without due process of law and confiscate such property and his business and destroy its value and render it useless without compensation and deny the right to earn a livelihood, and will prohibit ownership, (etc.) of property lawfully and legally acquired and previously licensed, "all in violation of the provisions of the Constitution of the United States and the Constitution of the State of Oregon and of the rights and immunities guaranteed to the plaintiff and others similarly situated thereby".

This Court has repeatedly held that the clause in the constitution under which a right is claimed must be set forth specifically in the state court in order to support an appeal to this court: *New York Central, etc. R. Co v. New York*, 186 U.S. 269, 46 L. ed. 1158, 22 S. Ct. 916; *Thomas v. Iowa*, 209 U.S. 258, 52 L. ed. 782, 28 S. Ct. 487. The allegations in the complaint appear to lack sufficient specificity to draw in question the validity of the ordinance of the City of Portland, Oregon, on the

ground of its being repugnant to the Constitution of the United States, as required by the statute under which this appeal is taken, 62 Stat. 929, 28 U.S.C. § 1257 (2).

II. Abandonment of Constitutional Question.

Even if this Court deem the complaint sufficient to allege a federal constitutional issue on due process, then we submit that the appellant on the face of the record abandoned such issue. Such abandonment in the trial court is demonstrated by the statement in the dissenting opinion already mentioned (Jur. St. App. A, p. 21). Although plaintiff again had an opportunity in the Supreme Court of Oregon to present argument on such matters, again he continued this abandonment of such issues as shown by the colloquy quoted in the special concurring opinion of Chief Justice Latourette, and as shown by the statement in the majority opinion: "Upon this appeal the plaintiff does not claim that the ordinance contravenes any principle of constitutional law * *" (Jur. St. App. B, p. 36, 58 Or. Adv. Sheets 547, 549, 269 P. 2d 544, 546.)

The Oregon Supreme Court has laid down as a rule of practice that the province of the state appellate court is only to review questions raised in the lower court. To this effect is *Stoddard Lbr. Co. v. Oregon Washington R. & N. Co.*, 165 P. 363, 84 Or. 399, 418. Similarly the Oregon Supreme Court has held that a party to appellate review may not assume an attitude inconsistent with that taken by him in the trial court: *Wallace v. American Life Ins. Co.*, 225 P. 192, 227 P. 465, 111 Or. 510,

525. That a plaintiff may abandon broad issues presented by the complaint and thereafter be bound by such abandonment on appeal is demonstrated by *Sabin v. Terrall*, 206 P. 2d 100, 186 Or. 238, 244.

This Court held in *Hulbert v. City of Chicago*, 202 U.S. 275, 50 L. ed. 1026, 26 S. Ct. 617, that federal questions which the highest state court is justified in disregarding under its rules of practice, either because not assigned or because not noticed or relied upon in brief or argument of counsel, will not serve as a basis for review by the Supreme Court of the United States. Similarly in *Cox v. Texas*, 202 U.S. 446, 50 L. ed. 1099, 26 S. Ct. 671, this Court pointed out that where the state court did not deal with a partcular federal question and the state court might have refused to do so on the ground that the question was not raised in the trial court, the United States Supreme Court would not consider the question.

So also in *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Slade*, 216 U.S. 78, 54 L. ed. 390, 30 S. Ct. 230, it was declared that appellate jurisdiction of the federal Supreme Court over a state court cannot be based upon a supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court.

Therefore we submit that since appellant had abandoned any federal constitutional issue both in the trial court and in the Supreme Court of Oregon, this Court will not take appellate jurisdiction.

III. The Federal Question Was Not Timely Raised.

The exact question relied upon for this appeal was sought to be raised by plaintiff in his petition to the Oregon Supreme Court for rehearing. In Oregon it has been held that contentions first presented on petition for rehearing may be considered waived, *Paine v. Meier & Frank*, 27 P. 2d 315, 29 P. 2d 531, 146 Or. 40, 53.

This Court has repeatedly held that federal questions first raised by petition for rehearing are too late: *Pim v. St. Louis*, 165 U.S. 273, 41 L. ed. 714, 17 S. Ct. 322; *Texas & Pac. Ry. Co. v. Southern Pacific Co.*, 137 U.S. 48, 34 L. ed. 614, 11 S. Ct. 10; *Poydras de la Lande v. Treasurer of Louisiana*, 18 How. 192, 15 L. ed. 350. Certainly this is the general rule of this Court where the State Supreme Court denied the petition for rehearing without reference to the federal question. *Wall v. Chesapeake & Ohio Ry. Co.*, 256 U.S. 125, 65 L. ed. 856, 41 S. Ct. 402; *St. Louis & San Francisco Ry. Co. v. Shepherd*, 240 U.S. 240, 60 L. ed. 622, 36 S. Ct. 274; *McMillen v. Ferrum Mining Co.*, 197 U. S. 343, 49 L. ed. 784, 25 S. Ct. 533. In this case the Oregon court denied the petition without discussion or comment.

In *Chicago, Indianapolis, Louisville Ry. Co. v. McGuire*, 196 U.S. 128, 133, 49 L. ed. 413, 417, 25 S. Ct. 200, this Court noted that the charge of violation of federal right first set up in the petition for rehearing in the State Supreme Court is too late to serve as a basis for exercise of appellate jurisdiction in the United States Supreme Court, where it does not affirmatively appear that the State Court passed upon the federal question

and denial of the petition may well have been upon the ground that the question not having been presented in the court below could not be made available upon appeal. The court commented:

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of the court as an afterthought, when all other resources of litigation have been exhausted."

We think this observation applicable here, and appellant failed to raise a federal issue in time.

IV. The State Court Opinions Did Not Cover the Ground Claimed for Appeal.

The opinions given in the Supreme Court of Oregon and in the state trial court as previously pointed out, did not cover the issue offered as ground for this appeal. The opinions in the Supreme Court of Oregon covered only the extent of the police power and propriety of action under such power by the City of Portland, Oregon, in enacting the ordinance, and the question of conflict with state statutes and state policy. This Court has often pointed out that the federal question required as a basis for appellate jurisdiction must have been raised in the highest court of the state for decision, and must also have been decided, or else decision thereon must have been necessary to the judgment or decree rendered in the case. To this effect are *Chouteau v. Gibson,* 111 U.S. 200, 28 L. ed. 400, 4 S. Ct. 340; *Bolling v. Lersner,* 91 U.S. 594, 23 L. ed. 366; *Hamilton Mfg. Co. v. Massachusetts,* 6 Wall. 632, 18 L. ed. 904 and *Crowell v. Randell,* 10 Peters 368, 9 L. ed. 458. We submit that this case furnishes no such state decisional basis.

V. No Federal Question Was Necessary to the State Judgment and It Rests on an Adequate Non-Federal Basis.

This Court has repeatedly held that in order to sustain appellate jurisdiction it must appear on the record that the federal question was so directly involved that the state court could not have given judgment without deciding the federal right, privilege or immunity which is claimed: *Sayward v. Denny,* 158 U.S. 180, 39 L. ed. 941, 15 S. Ct. 777; *Brown v. Atwell,* 92 U.S. 327, 23 L. ed. 511.

In this case not only did the Supreme Court of Oregon point out the lack of claim of constitutional issues, but it is self-evident in the opinions that they rested upon non-federal ground. The question of police power does not, we submit, automatically or necessarily involve substantive due process of law under the 14th Amendment to the Federal Constitution. If it is determined that the statute or ordinance attacked is not a proper exercise of that power, then the question of substantive due process may be involved or some other inhibition of the Feleral Constitution. Obviously procedural due process has no bearing on this case. The Oregon Supreme Court, on the contrary, found the ordinance to be a proper and reasonable exercise of the police power.

This Court pointed out that the 14th Amendment of the Federal Constitution was not designed to interfere with the exercise of its police power by a state. *Barbier v. Connolly,* 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; *Atlantic Coast Line Ry. Co. v. Goldsboro,* 232 U.S.

548, 558, 58 L. ed. 721, 34 S. Ct. 364. Only if a police power measure goes too far will it be recognized as a taking of property for which compensation must be made: *New Orleans Public Service v. New Orleans*, 281 U.S. 682, 74 L. ed. 1115, 50 S. Ct. 449; *New York & N.E. Ry. Co. v. Bristol*, 151 U.S. 556, 557, 38 L. ed. 269, 272, 273, 14 S. Ct. 437.

Questions of conflict between state statutes and city ordinances, and general state policy and city ordinances, cannot be construed in any way to draw in question the Constitution of the United States or federal law or treaty.

It is therefore apparent that the decision of the Oregon Supreme Court in this case did not involve directly or indirectly a determination of federal questions even if such questions be deemed issues.

Indeed the decision of the State Supreme Court that the ordinance in question was a valid exercise of the police power removed the necessity of considering the question of due process, whether invoked under the federal or state constitution, properly or not. Enforcement of a law which has been found to be based upon the legislative exercise of the police power is not a taking of property without due process of law. To this effect among many others are the cases of *Mugler v. Kansas*, 123 U.S. 623, 663, 665, 31 L. ed. 205, 211, 8 S. Ct. 273; *Chicago Burlington & Quincy Ry. Co. v. Illinois ex rel Grimwood*, 200 U.S. 561, 50 L. ed. 596, 26 S. Ct. 341; *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U.S. 67, 77, 59 L. ed. 1204, 1211, 35 S. Ct. 678; and *California*

State Automobile Assn. v. Maloney, 341 U.S. 105, 95 L. ed. 788, 71 S. Ct. 601.

The record clearly demonstrates that in the view which the state court took of this case, no decision was necessary with regard to the constitutional questions now sought to be made the basis for this appeal. Therefore in line with previous decisions of this Court the United States Supreme Court will not take jurisdiction: *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 35 L. ed. 943, 12 S. Ct. 142; *DeSaussure v. Gaillard*, 127 U.S. 216, 32 L. ed. 125, 8 S. Ct. 1053; *Bolling v. Lersner*, 91 U.S. 594, 23 L. ed. 366; *McManus v. O'Sullivan*, 91 U.S. 578, 23 L. ed. 390; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506.

VI. The Federal Question Sought to Be Presented in This Appeal Is Unsubstantial.

This Court has repeatedly held that appellate jurisdiction requires more than the mere assertion of a federal question. The question presented must be real and colorable; *Hamblin v. Western Land Co.*, 147 U.S. 531, 37 L. ed. 267, 13 S. Ct. 353; *Clarke v. McDade*, 165 U.S. 168, 41 L. ed. 673, 17 S. Ct. 284; *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86, 77 L. ed. 180, 53 S. Ct. 32; *Honeyman v. Hanan*, 300 U.S. 14, 81 L. ed. 476, 57 S. Ct. 350 (Appeal dismissed, 302 U.S. 375, 82 L. ed. 312, 58 S. Ct. 273).

We submit that on the face of the record the sole federal question now presented as a basis for this appeal

is clearly without foundation or substance. The due process clause does not render a legislative body powerless to prohibit a business it deems to be evil or such a source of evil as to require prohibition, merely because that business was not previously prohibited, and was permitted and merely regulated.

This Court held in *Ah Sin v. Wittman,* 198 U.S. 500, 49 L. ed. 1142, 25 S. Ct. 756, that unless legislation clearly effects an unmistakable infringement of right secured by fundamental law, legislation suppressing gambling will be upheld by the court as concededly within the police power of a state. The case of *Murphy v. California,* 225 U.S. 623, 56 L. ed. 1229, 32 S. Ct. 697, held valid a city ordinance prohibiting any person from keeping or maintaining a billiard or pool hall except in hotels of a certain size. This Court said (p. 628 of 225 U.S.; p. 1232 of 56 L. ed.):

> "The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.
>
> "Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the supreme court of California on plaintiff's application for habeas corpus, a nuisance per se. But it may

become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

* * *

"As said in Booth v. Illinois, 184 U.S. 425, 429, 46 L. ed. 623, 626, 22 S. Ct. Rep. 425:

"'A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.'"

This Court held in *Stone v. Mississippi ex rel. Harris,* 101 U. S. 814, 25 L. ed. 1079, that the state could prohibit lotteries even though a state charter for a lottery was outstanding.

All contract and property rights can be held only subject to the fair exercise of the police power of the state, which the Oregon Supreme Court found to have been delegated to the City of Portland, Oregon in this case. To this effect are *Crowley v. Christensen,* 137 U.S. 86, 34 L. ed. 620, 11 S. Ct. 13; *Texas & New Orleans Ry. Co. v. Miller,* 221 U.S. 408, 55 L. ed. 789, 31 S. Ct. 534; and *Atlantic Coast Line Ry. Co. v. Goldsboro,* 232 U.S. 548, 58 L. ed. 721, 34 S. Ct. 364. The

ordinance involved in this case obviously covers only coin-in-the-slot devices within the boundaries of the city which are the boundaries of the city's jurisdiction. For effective prohibition of the banned devices, it is apparent that enforcement of the prohibition must begin at the source, the owners, rather than merely the proprietors of locations for their display.

So also in the case of *Breard v. Alexandria,* 341 U.S. 622, 632, 95 L. ed. 1233, 1243, 71 S. Ct. 920, it is said:

> "The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulation may restrict the manner of doing a legitimate business. * * * We think that even a legitimate occupation may be restricted or prohibited in the public interest * * *. The problem is legislative where there are reasonable bases for legislative action."

It is well settled that those types of property which may be abused for unlawful purposes contrary to general public morals such as gambling clearly fall in the same category as intoxicating liquors which this Court held to be prohibited without contravention of due process in a proper exercise of the police power, in *Mugler v. Kansas,* 123 U.S. 623, 31 L. ed. 205, 8 S. Ct. 273.

This Court has repeatedly held that a demurrer or motion to dismiss directed against a complaint, does not admit conclusions of law, or conclusions of fact not well pleaded. General allegations of law or fact are insufficient to rebut the findings of the City of Portland's legislative body set forth in the ordinance (Appendix A): *Pierce Oil Corp. v. Hope,* 248 U.S. 498, 500, 63 L.

ed. 381, 383, 39 S. Ct. 172; *Pacific States Box and Basket Co. v. White,* 296 U.S. 176, 185, 80 L. ed. 138, 146, 56 S. Ct. 159. The motion for judgment on the pleadings directed to the complaint in this case obviously served the office of demurrer or motion to dismiss. Therefore appellees did not, we submit, by their motion in the trial court, in any way give substance to the allegations of the complaint that pinball machines present no policing problem. The findings of the City Council are set forth in the ordinance and stand undiminished.

The ordinance is clearly a fair exercise of the police power, and its prohibition of certain coin-in-the-slot devices was evoked by the difficulty of enforcing regulations against misuse, all as set forth in the ordinance itself.

We deem it thus self-evident that the contentions of appellant are unsubstantial. This Court has repeatedly held that where contentions are on their face without merit, the United States Supreme Court is without jurisdiction of an appeal or review: *Patterson v. Stanolind Oil & Gas Co.,* 305 U.S. 376, 83 L. ed. 231, 59 S. Ct. 259; *Wick v. Chelan Electric Co.,* 280 U.S. 108, 74 L. ed. 212, 50 S. Ct. 41; *Quong Ham Wah Co. v. Industrial Accident Commission of California,* 255 U.S. 445, 65 L. ed. 723, 41 S. Ct. 373.

VII. This Appeal Is Obviously Prosecuted for Delay and Therefore Appellant Should Be Subjected to the Penalties Provided by Law.

Under 62 Stat. 954, Title 28, U.S.C., § 1912, where a judgment is affirmed by the United States Supreme Court, the Court may in its discretion award to the prevailing party just damages for his delay, and single or double costs. This Court has held that this statute is a means of discouraging frivolous appeals: *Whitney v. Cook*, 99 U.S. 607, 25 L. ed. 446.

We submit that the alleged ground of appeal in this case is so unsubstantial as to be frivolous. The conclusion is inescapable that this appeal is being prosecuted solely and simply for the purpose of delay, in an effort to buy time and thus continue these machines within the City of Portland, Oregon, by virtue of an injunction in the trial court which was unanimously overruled by the Supreme Court of the state. The mandate of the Supreme Court of Oregon has been delayed pending this appeal.

This Court declared in *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 57 L. ed. 140, 33 S. Ct. 80, that under the statute above cited, the power to impose the penalty provided by law rests in the discretion of the Court on dismissal of an appeal, coextensively with affirmance.

We submit that this case falls within the rule laid down by *Parker v. McLain*, 237 U.S. 469, 59 L. ed. 1051, 35 S. Ct. 632. The federal right claimed was not specially set up or claimed in the state court, was not

denied by its decision, does not have fair color of support and is utterly baseless, and therefore obviously this case was prosecuted merely for purposes of delay.

Accordingly we submit that this case fairly falls within the class of cases in which this Court should, as an exercise of its discretion, discourage appeals of this type and penalize the appellant by the award of double costs and the assessment of such damages as the Court may find just and equitable.

CONCLUSION

Appellees submit that appellant failed to allege with sufficient particularity in the complaint in this cause any claim that the ordinance attacked violated the due process clause of the 14th Amendment to the Federal Constitution, to serve as statutory ground for this appeal.

Even if the complaint be deemed sufficient in this regard, the record discloses that appellant abandoned such a claim, first in the trial court and again in the Supreme Court of Oregon. Although appellant did seek to make such claim in petition to the Oregon Supreme Court for rehearing, that claim was too late to serve as a basis for appeal to this Court, since the state court denied the petition without comment.

The record shows that the state court opinions did not cover any question of federal due process expressly or by necessary implication, and that such question was

not before the state courts. Therefore this appeal should fail on this ground also.

On its face the ordinance is valid and reasonable and the objections of appellant lack substance. Therefore we submit that this appeal is improper and should be dismissed.

This appeal appears to be made solely for purposes of delay, thus meriting the exercise of the Court's statutory discretion to impose double costs and damages upon appellant as an appropriate penalty for the delay and vexation of this appeal.

Respectfully submitted,

ALEXANDER G. BROWN,
Attorney for Defendants-Appellees.

MARIAN C. RUSHING,
Of Counsel.

APPENDIX "A"

ORDINANCE NO. 94553

An Ordinance amending Article 11 of Ordinance No. 76339 (Police Code) by adding a new section so as to prohibit ownership, maintenance, use, play, etc., of any coin-in-the-slot device, excluding however music devices, certain types of vending machines and games or amusement devices other than pin-ball machines or digger or grabbing devices where no element of chance, bonus or prize is inherent in such game or device, and declaring an emergency.

The City of Portland does ordain as follows:

Section 1. The Council finds that coin-in-the-slot operated devices of various types present problems of law enforcement since such devices may be adapted or misused for the purpose of conducting lotteries or gambling; that the prohibition of play by minors of such devices presents difficult policing problems; that therefore all such devices with certain specific exceptions should be prohibited within the City regardless of any element of skill involved, and regardless of any intention to use such device for amusement only; now, therefore, Article 11 of Ordinance No. 76339 (Police Code), hereby is amended by adding thereto a new section to be entitled, numbered, and to read as follows:

Section 16-1129 COIN-IN-THE-SLOT-DEVICES

It hereby is unlawful for any person to own, maintain, control, operate, use or play or permit to

be owned, maintained, controlled, operated, used or played either as operator, user or player or as owner, proprietor, lessee, employe or agent, any coin-in-the-slot operated mechanical game or device or other device of like character regardless of whether such game or device be operated or played for a profit or prize or for further operation or play, or for the display or exercise of skill or for amusement, and whether or not any element of skill is involved in any way in said operation, use or play. This section shall not be deemed to apply to music devices or vending machines where no element of chance, bonus or prize is involved in such vending, whether such vending machine vends merchandise, commodities or special services or privileges, nor to games or amusement devices other than pinball games or digger or grabbing devices, where no element of chance, bonus or prize is inherent in such game or device.

Section 2. Inasmuch as this ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland in this: That law enforcement should be aided and facilitated in accordance with the provisions hereof in order to alleviate policing problems; therefore an emergency hereby is declared to exist and this ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council July 14, 1951.

Mayor of the City of Portland

Attest

Auditor of the City of Portland